1989

Park City Municipal Corporation v. THE CLUB, THE ALAMO, LIQUID ASSETS, INC., THE CLUB/449 MAIN, FOUR FORTY-NINE, a non-profit corporation, THERESE M. LAWTON, KEITH BRONSTEIN, ANNE ALLENDE, MIKE STEMLER, BILL DAHLQUIST, CHRIS JAMES, SONNY SUNDQUIST, DOUG WATCHHORN, and any other person claiming a management or ownership interest in the above mentioned establishments or organizations : Brief of Appellant

Utah Court of Appeals

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Jame W. Carter; Park City Attorney; Attorney for Respondent.
David B. Thompson; Attorney for Appellants.

IN THE UTAH COURT OF APPEALS

IN RE:

REVOCATION OF BEER AND LIQUOR LICENSE AND BUSINESS REVENUE LICENSE

PARK CITY MUNICIPAL CORPORATION,

Plaintiff-Respondent,

Case No. 890517-CA

vs.

THE CLUB, THE ALAMO, LIQUID ASSETS, INC., THE CLUB/449 MAIN, FOUR FORTY-NINE, a non-profit corporation, THERESE M. LAWTON, KEITH BRONSTEIN, ANNE ALLENDE, MIKE STEMLER, BILL DAHLQUIST, CHRIS JAMES, SONNY SUNDQUIST, DOUG WATCHHORN, and any other person claiming a management or ownership interest in the above mentioned establishments or organizations,

Category No. 14b

Defendants-Appellants.

BRIEF OF APPELLANTS

APPEAL FROM A DISMISSAL OF AN APPEAL OF A DECISION OF THE PARK CITY COUNCIL, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SUMMIT COUNTY, STATE OF UTAH, THE HONORABLE TIMOTHY R. HANSON, JUDGE PRESIDING.

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BRIEF OF APPELLANTS

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from the district court's dismissal of the Club/Alamo's [1] appeal of "The Findings of Fact, Conclusions of Law, and Order By The Park City Council" (hereinafter cited as "Ruling") entered by the Park City Council in a license revocation proceeding.

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[1] For convenience, appellants in this appeal will be referred to throughout this brief as the "Club/Alamo," the private clubs that were the subject of the license revocation proceeding in Park City that gives rise to this appeal.

This Court has jurisdiction to hear the appeal under Utah Code Ann. § 78-2a-3(2)(b) (Supp. 1989).

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue presented on appeal is whether the district court erred in dismissing the Club/Alamo's appeal of the decision of the Park City Council in a license revocation proceeding initiated against the Club/Alamo by Park City.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Relevant text of constitutional and statutory provisions pertinent to the resolution of the issue presented on appeal is contained in the body of this brief.

STATEMENT OF THE CASE

In June 1988, the City Manager of Park City, through the City Manager Designee, Larry R. Keller, initiated proceedings before the Park City Council under certain ordinances of Park City (hereafter "City") to revoke the liquor and beer licenses and business licenses issued by the City to the Club/Alamo for the year 1988. (R. 301-305)

The Council referred the matter to a licensed hearing examiner, A. Robert Thurman, for the taking of evidence and the preparation of recommended findings of fact and conclusions of law, and a recommended order. After the receipt of evidence, submission of briefs, and presentation of oral argument, the hearing examiner filed his recommendations with the Council on February 13, 1989 (R. 600 at pp. 1-28). He ultimately recommended

dismissal of the revocation action against the Club/Alamo (R. 600 at pp. 23-28).

After receiving a motion to dismiss from the Club/Alamo and additional briefing and oral argument from the parties, and upon considering the hearing examiner's recommendations, the Council issued its findings of fact, conclusions of law, and order on March 9, 1989. Ruling (R. 55-64) (a copy of which is contained in Appendix A). Although the Council, "[b]ased on equitable considerations and on the feeling that no useful purpose would be served by levying sanctions against the [Club/Alamo]," dismissed the "Order to Show Cause" filed against those establishments, it ruled that the Club/Alamo were in violation of certain of the liquor/beer license and business license ordinances. Ruling at 7-10 (R. 61-64). Specifically, the Council ruled that the Club/Alamo had violated P.C. Ordin. 83-16 § 6.01(b)2, which provides:

> Licenses issued under this ordinance may be suspended or revoked by the City Council for the following reasons:
>
> . . .
>
> (b) The licensee or employees of the licensee have been convicted or plead [sic] guilty to violations occurring under Section 7.01 of this ordinance on the licensed premise, not including violations by patrons[.]

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[2] Citations to "P.C. Ordin." are to the ordinances of Park City.

Section 7.01 sets forth conduct that constitutes "Offenses of Licensee," which are punishable as a class B misdemeanor, see 83-16 § 7.03. It also ruled that the Club/Alamo had violated P.C. Ordin. 87-12 § 15(3), which provides that the City Council may suspend or revoke a business license if the City Council finds that "the business is a front for or the site of illegal activity" (the full text of the pertinent portion of § 15 is contained in Appendix B).

The Club/Alamo then filed an appeal from the Council's ruling in district court 3 (R. 1-52). In that appeal, the Club/Alamo argued that (1) the Council did not have the authority to perform the administrative function of license revocation; (2) the Park City ordinances regulating the service, sale, and storage of liquor by a "private club" are invalid on the ground of preemption by state law; (3) the Council erroneously found the Club/Alamo in violation of P.C. Ordin. 83-16 § 6.01(b) by construing that provision in a manner inconsistent with its plain language; (4) P.C. Ordin. 87-12 § 15(3) is unconstitutionally vague, or, alternatively, is constitutional only if construed and applied in the manner suggested by the hearing examiner; and (5) the Council's treatment of "The Club" and "The Alamo" as a single

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3 The Utah Court of Appeals no longer has primary appellate jurisdiction over appeals from the final orders of local agencies in adjudicative proceedings. Compare Utah Code Ann. § 78-2a-3(2)(a) (Supp. 1989) with former Utah Code Ann. § 78-2a-3(2)(a) (1987). The district court conducts the initial review in such cases, and this Court reviews the district court's decision. Utah Code Ann. § 78-2a-3(2)(b) (Supp. 1989).

business entity for purposes of the license revocation proceeding, even though separate beer and liquor licenses and business licenses are issued to each by the City, violated Park City's ordinances and denied the licensees equal protection of the law (R. 21-51). The City responded by filing a motion to dismiss the appeal (R. 556-564). The district court granted the City's motion, ruling that the court "lack[ed] jurisdiction of the appeal for the reason that appellants lack standing to appeal and that the issues sought to be raised on appeal herein are moot" (R. 582-583) (a copy of the district court's order is contained in Appendix C).

The Club/Alamo filed the instant appeal from the district court's order dismissing their appeal (R. 585).

STATEMENT OF FACTS

The facts pertinent to this appeal are contained in the Statement Of The Case, above.

SUMMARY OF ARGUMENT

Because the Club/Alamo were aggrieved by the Council's order, they were properly before the district court on appeal pursuant to the applicable Park City ordinances.

Alternatively, the district court had jurisdiction to review the Council's unlawful actions under Utah R. Civ. P. 65B(b)(2).

Finally, because the requested judicial relief can affect the rights of the Club/Alamo, their appeal to the district court should not have been dismissed as moot.

ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING THE CLUB/ALAMO'S APPEAL FOR LACK OF JURISDICTION; THE COURT HAD JURISDICTION TO HEAR THE APPEAL, WHICH RAISED ISSUES THAT WERE NOT MOOT, UNDER P.C. ORDIN. 83-16 § 6.01m. AND P.C. ORDIN. 87-12 § 15, OR, ALTERNATIVELY, UNDER UTAH R. CIV. P. 65B(b)(2).

When filing their initial appeal in the district court, the Club/Alamo asserted as a basis for appellate jurisdiction in that court the provisions of P.C. Ordin. 83-16 § 6.01m. and P.C. Ordin. 87-12 § 15, or, alternatively, Utah R. Civ. P. 65B(b)(2) (R. 2-3). The district court rejected those bases for jurisdiction, accepting the City's argument that the Club/Alamo lacked appellate standing because they were not "licensee[s] aggrieved by an Order of the City Council," as required by 83-16 § 6.01m and 87-12 § 15, and because Utah R. Civ. P. 65B(b)(2) could not be used as a substitute for seeking review of the case by a declaratory judgment action pursuant to Utah Code Ann. § 78-33-1 et seq. (1987) [4] (a copy of the City's memorandum in support of its motion to dismiss is contained in Appendix D). The court's conclusion, like the City's arguments on this point, was founded on an

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[4] Although the district court's order does not articulate the City's arguments as grounds for the court's conclusion that the Club/Alamo lacked standing to appeal, it is clear from the minute entry the court issued prior to its signing of the order prepared by the City that the court had adopted the City's arguments in their entirety. See Minute Entry (R. 580) ("The Court grants Appellee's Motion to Dismiss for reasons advanced by the Appellee Park City Municipal Corp."). Therefore, subsequent references in this brief to the district court's conclusions are necessarily also references to the arguments advanced by the City in the district court.

unreasonably narrow construction of the pertinent Park City ordinances and a failure to recognize traditional avenues of appellate review of administrative decisions.

P.C. Ordin. 83-16 § 6.01m. 5 provides:

> Any licensee aggrieved by an Order of the City Council entered pursuant to this section may maintain an action for relief therefrom in any court of competent jurisdiction, where said court deems itself the appropriate forum for the appeal from the City Council's action. The licensee shall be required to follow orders and procedures of the appropriate court with regard to time for filing.

A similarly worded provision is contained in P.C. Ordin. 87-12 § 15, the Park City ordinance dealing with the revocation and suspension of business licenses issued by the City. Central to the district court's conclusion that the Club/Alamo lacked appellate standing is the claim that they were not "aggrieved" by the "Order of the City Council." It accepted the City's position that the Club/Alamo received in the Council's order everything they requested--i.e., a dismissal of the action--and thus, as a "prevailing" party, were not entitled to appeal under the Park City ordinances. Such a position ignores the basis upon which the Council issued its order of dismissal and argues for an unreasonably narrow construction of the terms "aggrieved" and "Order" as used in 83-16 § 6.01m and 87-12 § 15.

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5 P.C. Ordin. 83-16 § 6.01 deals with the suspension and revocation of liquor and beer licenses issued by the City. Section 6.01m specifically addresses appellate review of an order of the City under section 6.01.

Although the Club/Alamo admittedly received the dismissal they requested, that dismissal was not grounded on factual and legal conclusions exonerating the licensees of guilt, but rather on the Council's "equitable considerations and . . . feeling that no useful purpose would be served by levying sanctions against the establishments known as 'The Club' and 'The Alamo' . . . ." Ruling at 9 (emphasis added). The Council specifically found that the Club/Alamo were in violation of P.C. Ordin. 83-16 §6.01(b) and P.C. Ordin. 87-12 § 15 and were therefore subject to sanctions, Ruling at 7-8, 9; however, it decided not to impose sanctions for those violations. In conjunction with its conclusion that the Club/Alamo were guilty of the violations just described, the Council concluded that it "ha[d] jurisdiction over the parties and the subject matter involved in this revocation proceeding." Ruling at 7. On each of these points, the Council plainly rejected contrary arguments advanced by the Club/Alamo.

With the foregoing in mind, the meaning of the term "Order" as used in 83-16 § 6.01m. and 87-12 § 15 may now be addressed. Contrary to the view the City and the district court apparently adopted, "Order" cannot reasonably be read to include only the "bare-bones" order issued by the Council (i.e., dismissal of the action). An "Order" necessarily encompasses all the pertinent factual and legal conclusions that underpin the ultimate result reached by the Council. To interpret "Order" in the extremely narrow fashion proposed by the City and the court would strip the Council's decision of its essential elements and result in an

insulation from judicial review that could not have been intended by the drafters of the pertinent ordinances.

As for the term "aggrieved," the court also adopted an unreasonably narrow construction. It essentially concluded that, because the Club/Alamo did not suffer any sanctions concerning their beer and liquor licenses and business licenses, they were not "aggrieved" by the Council's order, and that a sanction must have been imposed against a party by the Council's order before that party may seek judicial review under 83-16 § 6.01m. or 87-12 § 15.

The term "aggrieved" is not defined in either ordinance. However, the Utah Supreme Court has had occasion to construe language similar to that at issue here. In noting that a sheriff, whose decision to discharge one of his deputies had been reversed by the Merit Commission, enjoyed a statutory right to appeal the Commission's reversal under Utah Code Ann. § 17-30-20 (1987), the Court said:

> An "aggrieved party" must be both a party to the proceeding and one who is prejudiced or affected by the order. The sheriff in this case was clearly an aggrieved party. He discharged Deputy Jones. The Merit Commission's order reinstating Deputy Jones affects the sheriff, as he and his department would be required to work with a person the sheriff apparently believed was not qualified to serve as a deputy sheriff. The sheriff had a statutory right to appeal.

Matter of Discharge of Jones, 720 P.2d 1356, 1360 (Utah 1986) (citations omitted). Applying that definition of "aggrieved" to the instant case, along with the proper construction of the term

"Order" discussed above, the Club/Alamo were clearly aggrieved by the Council's order which included rulings adverse to the Club/Alamo on the issues of jurisdiction, preemption, construction of pertinent ordinances, and guilt concerning alleged violations of the beer/liquor and business licensing ordinances--matters that are central to the propriety of the entire revocation proceeding against the licensees. The adverse actions of the Council plainly affected the Club/Alamo's legal rights, such that the Club/Alamo can be fairly considered "licensee[s] aggrieved by an Order of the City Council" under 83-16 § 6.01m. and 87-12 § 15. This construction is consistent with the principles of statutory interpretation this Court recently applied in construing a city ordinance in Salem City v. Farnsworth, 753 P.2d 514 (Utah Ct. App. 1988). Therefore, the district court erred in dismissing the Club/Alamo's appeal on the ground that they lacked appellate standing under the relevant Park City ordinances.

Second, the city and the district court devoted little attention to the Club/Alamo's alternative claim of jurisdiction under Utah R. Civ. P. 65B(b)(2). It is well established law in Utah that, where there is no statute or ordinance specifically authorizing judicial review, a party may seek relief from arbitrary or unlawful local agency action under Rule 65B(b)(2). See, e.g., DeBry v. Salt Lake County Board of Appeals, 764 P.2d 627, 628 n.2 (Utah Ct. App. 1988). That is precisely what the Club/Alamo sought in their appeal. Neither the City nor the court offered anything to demonstrate why jurisdiction would not, in the

alternative, lie in the district court under Rule 65B(b)(2) as explained in DeBry. And, contrary to what the City and the court apparently believed, nothing in either Rule 65B(b)(2), § 78-33-1 et seq., or the relevant case law even suggests that the Club/Alamo were required to pursue a declaratory judgment action rather than seek review under Rule 65B(b)(2). Indeed, in McRae & DeLand v. Feltch, 669 P.2d 404, 406 (Utah 1983), the Utah Supreme Court made clear that the appropriate procedure for challenging the jurisdiction of a lower tribunal--an issue central to the instant case--is not a declaratory judgment action, but rather is a petition for extraordinary relief under Rule 65B(b)(2). Moreover, although there does not appear to be a Utah appellate decision directly on point, it is widely held that a declaratory relief action is not the appropriate vehicle for review of an administrative decision when there exists a procedure to appeal from an administrative ruling. See, e.g., Tanner Companies v. Arizona State Land Dept., 142 Ariz. 183, 688 P.2d 1075, 1079-80 (Ariz. App. 1984), and cases cited therein; Ricks Exploration v. Oklahoma Water Resources Bd., 695 P.2d 498, 502 (Okl. 1984); Selby Realty Co. v. City of Buenaventura, 10 Cal.3d 110, 109 Cal. Rptr. 799, 514 P.2d 111, 122 (1973).

Finally, the district court's mootness finding misunderstood both the nature and significance of the relief sought by the Club/Alamo. Their appeal sought reversal of the Council's order on the issues of jurisdiction, preemption, and construction and application of the pertinent ordinances. This relief clearly can

affect the Club/Alamo's right to be free from the collateral consequences that could flow from the Council's rulings that the Club/Alamo had violated 83-16 § 6.01(b) and 87-12 § 15(3)--for example, those rulings obviously could affect the Club/Alamo's ability to renew their beer/liquor licenses (see P.C. Ordin. 83-16 § 5.11(d) 6) or to defend themselves in a future action for business license suspension or revocation brought under 87-12 § 15(3) ("front for or the site of illegal activity" provision). A case is deemed moot only when the requested relief cannot affect the rights of the litigants. See Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989). Clearly, as just noted, the Club/Alamo's rights would be significantly affected if the district court were to grant the requested relief. Cf. Spain v. Stewart, 639 P.2d 166, 167 n.1 (Utah 1981) (discussing collateral consequences exception to the mootness doctrine in criminal context). Therefore, that court erred in dismissing the Club/Alamo's appeal as moot.

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[6] P.C. Ordin. 83-16 § 5.11(d) provides in pertinent part:

. . . .

Licenses shall be renewed unless the Council shall find that:

. . .

(d) The licensee or his employees or agents have been convicted of or plead [sic] guilty to more than five (5) violations of this ordinance or State liquor control statutes relative to the conduct of the licensed premises in a single calendar year preceding the renewal, not including violation by patrons.

CONCLUSION

Because the Club/Alamo were aggrieved by the Council's order, they were properly before the district court on appeal pursuant to the applicable Park City ordinances. Alternatively, the district court had jurisdiction to review the Council's unlawful actions under Utah R. Civ. P. 65B(b)(2). Finally, because the requested judicial relief can significantly affect the rights of the Club/Alamo, the lower court should not have dismissed their appeal as moot.

Accordingly, this Court should reverse the district court's order of dismissal and remand the case to that court to conduct review of the Council's ruling as requested by the Club/Alamo.

RESPECTFULLY submitted this 20th day of December, 1989.

David B. Thompson
David B. Thompson
Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that four true and exact copies of the foregoing brief were mailed, postage prepaid, to James W. Carter, attorney for respondent, 445 Marsac Avenue, P.O. Box 1480, Park City, Utah 84060, this 20th day of December, 1989.

David B. Thompson

APPENDICES

APPENDIX A

BEFORE THE CITY COUNCIL OF PARK CITY, UTAH

IN RE: REVOCATION OF BEER AND LIQUOR LICENSE AND BUSINESS REVENUE LICENSE	)	
PARK CITY MUNICIPAL CORPORATION, Petitioner	)	
v.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER BY THE PARK CITY COUNCIL
THE CLUB, THE ALAMO, LIQUID ASSETS, INC., THE CLUB/449 MAIN, FOUR FORTY NINE, A NON-PROFIT CORP., THERESE M. LAWTON, KEITH BRONSTEIN, ANN ALLENDE, MIKE STEMLER, BILL DAHLQUIST, CHRIST JAMES, SONNY SUNDQUIST, DOUG WATCHORN, AND ANY OTHER PERSONS CLAIMING A MANAGEMENT OR OWNERSHIP INTEREST IN THE ABOVE-NAMED ESTABLISHMENTS OR ORGANIZATIONS, Respondents	)	NO. 88-001

FINDINGS OF FACT

After considering the recommended Findings of Fact and Conclusions of Law and Order by A. Robert Thurman, Licensed Hearing Examiner, and after hearing arguments of Petitioner and Respondent at an open meeting on February 23, 1989, being fully advised in the premises, and good cause appearing, the Park City Council herein enters its Findings of Fact:

1. Respondents "The Club" and "The Alamo" constitute a single business operated in adjoining space, in a single building

located at 449 Main Street in Park City. While the City has issued beer and liquor licenses to each entity separately for revenue purposes, there is no doubt, and we find, that they are, de facto, a single business.

2. There is no doubt, and we find, that "The Club" and "The Alamo" are unregistered, d.b.a's used by Four Forty-Nine Main, Inc., a Utah non-profit corporation which is responsible for the combined establishment known as both "The Club" and "The Alamo". The board of trustees for Four Forty-Nine Main, Inc., is comprised of Therese M. Haberkorn (Lawton), Keith Bronstein, Mike Stemler, Ann Allende, Bill Dahlquist, Doug Watchorn and Chris James.

3. The actual operation of the business known as "The Club" and "The Alamo" is performed by Liquid Assets, Inc., a Utah for-profit corporation. The Directors of Liquid Assets, Inc., are Bill Dahlquist, Chris James and Sonny Sundquist. The officers of Liquid Assets, Inc., are Therese M. Lawton, president; Keith Bronstein, vice-president; Ann Allende, secretary; and Mike Stemler, treasurer.

4. The City's licensees appear to be both Four Forty-Nine Main, Inc. and Liquid Assets, Inc., and we so find for the purposes of this hearing. The individuals presently associated with the management of the business known as "The Club" and "The Alamo" are Therese M. Lawton, Keith Bronstein, Ann Allende, Mike Stemler, Douglas Watchorn, William Dahlquist, Chris James and Sonny Sundquist.

5. Four Forty-Nine Main, Inc., leases space in a building owned by a partnership called Historic '84-Park City. The partners of Historic '84-Park City are William Dahlquist, Carl Redlin, Douglas Watchorn and Milton Stemler, each holding a 25% interest in the partnership.

6. Milton Stemler is the father of Mark Stemler, and he acquired his ownership interest in the Historic '84-Park City partnership, and thus the leased building, through his son. Mike Stemler and Ann Allende are the brother and sister, respectively, of Mark Stemler.

7. The original owners of Liquid Assets, Inc., were Cindy David and Mark Stemler, each apparently owning 5,000 shares of the 10,000 shares authorized. On November 5, 1985, those two parties entered into a stock purchase agreement, under the terms of which Mark Stemler was to buy Cindy David's interest represented by 5,000 shares of stock for $84,000.00, payable $4,000.00 down, $6,000.00 on or before May 1, 1986, and the balance in 36 monthly installments at four percent (4%).

8. On July 26, 1986, Mark Stemler plead guilty in the federal district court in Wyoming to charges of Conspiracy to Distribute Cocaine and Distribution of Cocaine. He was sentenced to a ten-year term. He is presently serving his sentence at the federal correction facility at Boron, California.

9. Within days of his arrest on the federal charges, from the Wyoming jail where he was being held, Mark Stemler telephoned one Keith Bronstein (hereafter "Bronstein"), an employee

of Liquid Assets, and suggested Bronstein serve as a nominee during Mark Stemler's incarceration--that is, appear as ostensible owner, manage the business, and turn it back over to Mark Stemler at the end of his term. Bronstein testified that he declined the offer.

10. According to the testimony of Therese Lawton, nee Haberkorn (hereafter "Lawton"), presumably shortly after Mark Stemler's conversation with Bronstein, Mark Stemler called Lawton, again from the Wyoming jail. He protested his innocence on the drug charges and offered to sell his interest in Liquid Assets, Inc., for a sum to be agreed on later, together with an option to buy it back at the end of his incarceration for the same amount Lawton may have paid him in the meantime. She claims she then consulted her father, a CPA, on the purchase, and also sought and received legal advice. She is vague as to the advice received.

11. According to Lawton, approximately six weeks later, she got a second call from Mark Stemler, at which time he admitted he was guilty of the drug charges. According to Lawton, she became angry at Stemler's deception, cursed him, and told him she would not resell the corporation to him. Lawton testified that they then concluded an oral agreement over the phone. The terms of the oral agreement, according to Lawton, are as follows: Lawton was not required to pay any money down, but she was supposed to pay Mark Stemler's attorney's fees, such personal bills as Mark Stemler designated during the time of his incarceration, including VISA bills, and keep up the installment payments to Cindy David; when Mark Stemler is released from prison, Lawton is to pay him the

difference between $93,000, the agreed-upon purchase price, and the expenditures she has made on his behalf in the meantime.

12. According to Lawton's testimony, since that time she has carried out the terms outlined in the preceding paragraph. The agreement has never been reduced to writing, and no stock share certificates have been transferred.

13. From the record before us, it appears that Mark Stemler is currently a 50% shareholder and, therefore, a 50% owner of Liquid Assets, Inc. While the Hearing Examiner was convinced that Mr. Stemler had orally contracted to sell his interest in Liquid Assets, Inc., to Therese Lawton, there is no evidence of the consummation of that sale in the record before us, nor is there evidence of the consummation of the stock purchase agreement between Cindy David and Mark Stemler. We find that the record as to the ownership of Liquid Assets, Inc., and Four Forty-Nine Main, Inc., is incomplete, and therefore make no finding with regard to the ownership of the businesses known as "The Club" and "The Alamo".

14. During the five-month period from November, 1986, through March, 1987, Celeste Paquette Bernards (hereafter "Bernards"), an officer operating under cover for the Utah Metropolitan Narcotics Strike Force, was active in Park City investigating illicit drug activities in the area. Her activities culminated in the conviction or guilty pleas, under State statue, not Park City Ordinance, of a substantial number of persons, among whom are certain employees and customers of The Club/Alamo. She

stated she concentrated her efforts at The Club/Alamo because she found that establishment the easiest at which to make drug purchases. She purchased from, or was directed to sellers by doormen and other employees or agents of the establishment.

15. The apparently most egregious drug activity carried out on the premises was the handiwork of one Donald Riegelsperger, who, during the period in question, as a concessionaire, operated the food service on the premises. Both Lawton and Riegelsperger testified that they considered him an independent contractor. Lawton, however, directly or through Bronstein, exercised several indicia of control casting doubt on Riegelsperger's independence. At the very least, he was the establishment's agent, and we so find.

16. During the period Bernards was active, Riegelsperger was conducting a flourishing retail cocaine business in conjunction with the food operation. He employed one Jody Jane Young as a waitress, and she served Riegelsperger's entire product line. If Riegelsperger was an agent of The Club/Alamo, then obviously Young was a sub-agent, and we so find. Both Riegelsperger and Young plead guilty to a State charge of drug distribution.

17. Bernards attempted a drug purchase, ultimately aborted, through one Chris James, at that time a bartender at The Club/Alamo, and listed as a director of Liquid Assets. James' whereabouts are at present unknown; he is no longer employed at The Club/Alamo. He has not yet, to date, been convicted on any drug charge stemming from Bernards' activities.

18. Bernards also purchased drugs from or through Eugene Herrera, Chris Pederson, and Bruce Fecteau, all concededly employed as doormen on one or more occasions during Bernards' activity. Herrera, Pederson and Fecteau all plead guilty to State drug charges.

19. In addition to the above-named individuals, Bernards made a number of drug purchases from or through customers of The Club/Alamo she met on the premises. These purchases took place both on and off the premises of The Club/Alamo.

20. The record reflects substantial evidence and we find that the operation of The Club and The Alamo have posed a significant law enforcement problem in Park City.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Park City Council now enters the following Conclusions of Law:

1. The City Council has jurisdiction over the parties and the subject matter involved in this revocation proceeding.

2. The Order to Show Cause brought by the City Manager is appropriate in form, and all requirements of Park City Ordinances regarding the bringing of this Order to Show Cause have been met.

3. The Hearing Examiner in this case has concluded that Ordinance 83-16, Section 6.01(b), "was intended to apply when licensees are convicted under Section 7.01," and that therefore sanctions must be predicated upon a misdemeanor conviction under City Ordinance, rather than a felony conviction under State

statutes which proscribe the same conduct. The City Council rejects this conclusion, for it was clearly not the Council's intention to ignore felony convictions of federal or state drug crimes occurring on City-licensed premises and take action only on misdemeanor convictions. The facts are that three employees of the licensee and two agents of the licensee were convicted of or plead guilty to felony drug crimes which took place on the licensed premises. The Council concludes that those facts constitute the grounds for suspension or revocation contemplated by Section 6.01(b) of Ordinance 83-16.

4. The Hearing Examiner in this case has concluded that "Petitioner, successfully to predicate any revocation upon [Ordinance 83-16] Section 6.01(e), bears the burden of proving by a preponderance of the evidence that Lawton knew of the drug activities uncovered by (Agent) Bernards." The City Council holds that Section 6.01(e) provides a basis for license revocation separate from that set forth in Section 6.01(b) and does require knowledge of the licensee of the proscribed activities of employees and agents. The City Council concludes that the evidence does not show knowledge by Bronstein or Lawton of the drug transactions which took place at "The Club" and "The Alamo" and that there is therefore no basis for sanctions based on Section 6.01(e) of Ordinance 83-16.

5. The City Council agrees with the Hearing Examiner's conclusion that had Mark Stemler been found to be licensee, the City would have the grounds for license revocation under Ordinance

83-16, Section 6.01(d). Given that the Council has made no finding as to the ownership of Liquid Assets, Inc., or Four Forty-Nine Main, Inc.,the City Council concludes that there exists no present basis for revocation or suspension under Section 6.01(d) of Ordinance 83-16.

6. The Hearing Examiner suggests that Ordinance 87-12, Section 15(3), which provides that a business revenue license may be revoked or suspended by the City Council when the City Council finds that "the business is a front for or the site of illegal activity," requires a showing of intent on the part of a licensee to deceive or defraud the public or City. The City Council disagrees, and holds that "The Club" and "The Alamo" were the site of the illegal activities described in Findings of Fact No.'s 14, 15, 16, 17, 18 and 19, within the meaning of Section 15 of Ordinance 87-12.

ORDER

As is apparent from the foregoing Conclusions of Law, the City Council strongly disagrees with the Hearing Examiner's analysis of the meaning and application of the City's Beer and Liquor Licensing and Business Licensing Ordinances. Nevertheless, the City Council acknowledges that it requested that the Hearing Examiner make both Findings of Fact based on the evidence presented and Conclusions of Law based on application of the facts to the City's Ordinances. Based on equitable considerations and on the feeling that no useful purpose would be served by levying sanctions against the establishments known as "The Club" and "The Alamo", and

pursuant to Section 15(1) of Ordinance 87-12 and Section 6.01(1) of Ordinance 83-16, the City Council dismisses the Order to Show Cause in the instant matter and orders that the temporary licenses issued "The Club" and "The Alamo" be reinstated on the same terms and conditions as applied to all other City business and liquor licensees.

CITY COUNCIL OF PARK CITY

Hal W. Taylor

Ray Johnson

Bradley A. Olch

Ann MacQuoid

Kristen Rogers

James Santy

APPENDIX B

P.C. Ordin. 87-12 § 15:

> Any license issued under this ordinance may be revoked or suspended by the City Council when the City Council finds that: (1) the licensee has filed false or fraudulent license tax returns, (2) the licensee has been convicted of or plead [sic] guilty to or paid fines or settlements in criminal or civil actions brought by the State Tax Commission for the collection of, or arising from the non-payment of, taxes imposed by the state of Utah, (3) the business is a front for or the site of illegal activity, (4) the business has been the subject of a sufficient number of consumer complaints that it has the effect of tarnishing the reputation of other businesses within Park City.

APPENDIX C

JAMES W. CARTER, #0586
PARK CITY MUNICIPAL CORPORATION
P. O. BOX 1480
445 MARSAC AVENUE
PARK CITY, UTAH 84060
TELEPHONE (801) 649-9413

NO.....

FILED

JUL 25 1989

Clerk of Summit County

BY.....
Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT OF
SUMMIT COUNTY, STATE OF UTAH

IN RE: REVOCATION OF BEER AND LIQUOR LICENSE AND BUSINESS REVENUE LICENSE PARK CITY MUNICIPAL CORPORATION, Petitioner-Appellee v. THE CLUB, THE ALAMO, LIQUID ASSETS, INC., THE CLUB/449 MAIN, FOUR FORTY NINE, A NON-PROFIT CORP., THERESE M. LAWTON, KEITH BRONSTEIN, ANN ALLENDE, MIKE STEMLER, BILL DAHLQUIST, CHRIS JAMES, SONNY SUNDQUIST, DOUG WATCHORN, AND ANY OTHER PERSONS CLAIMING A MANAGEMENT OR OWNERSHIP INTEREST IN THE ABOVE-NAMED ESTABLISHMENTS OR ORGANIZATIONS, Respondents-Appellants	ORDER NO. 10213 HONORABLE J. DENNIS FREDERICK

The Motion to Dismiss of Appellee Park City Municipal Corporation having come on for consideration before the above-entitled court; Appellants being represented by David B Thompson and Joseph E. Tesch, and Appellee being represented by James W.

Carter; and the Memorandum of Points and Authorities in support of Park City Municipal Corporation's Motion to Dismiss and the Response to Appellee's Motion to Dismiss on file herein having been reviewed by the Court, the Court finds that it lacks jurisdiction of the appeal for the reason that appellants lack standing to appeal and that the issues sought to be raised on appeal herein are moot.

IT IS THEREFORE ORDERED, that the Appeal from the Findings of Fact, Conclusions of Law and Order entered by the Park City Council in a License Revocation Proceeding on file herein be dismissed, with each party to bear its own costs.

DATED this 25 day of July, 1989.

BY THE COURT

Honorable ~~J. Dennis Frederick~~
TIMOTHY R. HANSEN

NOTICE OF MAILING

I hereby certify that on July 14th 1989, a true and correct copy of the foregoing Order was mailed, postage prepaid, to:

David B. Thompson, Esq.
Joseph E. Tesch, Esq.
Attorneys for Appellants
P. O. Box 3390
Park City, Utah 84060

Anita L. Sheldon
Anita L. Sheldon, City Recorder

APPENDIX D

JUN 2 1999

JAMES W. CARTER, #0586
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IN THE THIRD JUDICIAL DISTRICT COURT OF
SUMMIT COUNTY, STATE OF UTAH

IN RE: REVOCATION OF BEER AND LIQUOR LICENSE AND BUSINESS REVENUE LICENSE PARK CITY MUNICIPAL CORPORATION, Petitioner-Appellee v. THE CLUB, THE ALAMO, LIQUID ASSETS, INC., THE CLUB/449 MAIN, FOUR FORTY NINE, A NON-PROFIT CORP., THERESE M. LAWTON, KEITH BRONSTEIN, ANN ALLENDE, MIKE STEMLER, BILL DAHLQUIST, CHRIS JAMES, SONNY SUNDQUIST, DOUG WATCHORN, AND ANY OTHER PERSONS CLAIMING A MANAGEMENT OR OWNERSHIP INTEREST IN THE ABOVE-NAMED ESTABLISHMENTS OR ORGANIZATIONS, Respondents-Appellants	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PARK CITY MUNICIPAL CORPORATION'S MOTION TO DISMISS NO. 10213 HONORABLE J. DENNIS FREDERICK

NATURE OF THE PROCEEDING

As set forth in the appeal of The Club, The Alamo, et al, (hereinafter collectively the Club/Alamo), this action arises out of a beer and liquor license and business license revocation proceeding initiated by the City Manager of Park City before the

City Council of Park City. That proceeding culminated in a document styled Findings of Fact, Conclusions of Law and Order by the Park City Council, which was attached to the Club/Alamo's appeal as Appendix A. The Order of the City Council, in its entirety, reads as follows:

> As is apparent from the foregoing conclusions of law, the City Council strongly disagrees with the Hearing Examiner's analysis of the meaning and application of the City's beer and liquor licensing and business licensing ordinances. Nevertheless, the City Council acknowledges that it requested that the Hearing Examiner make both findings of fact based on the evidence presented and conclusions of law based on application of the facts to the City's ordinances. Based on equitable considerations and on the feeling that no useful purpose would be served by levying sanctions against the establishments known as "The Club" and "The Alamo", and pursuant to Section 15(1) of Ordinance 87-12 and Section 6.01(1) of Ordinance 83-16, the City Council dismisses the Order to Show Cause in the instant matter and orders that the temporary licenses issued to "The Club" and "The Alamo" be reinstated on the same terms and conditions as applied to all other City business and liquor licensees.

NATURE OF THE CASE

The Club/Alamo has brought this appeal "from the findings of fact, conclusions of law and order" of the City Council, invoking jurisdiction under Park City Ordinance 83-16 § 6.01(m), Park City Ordinance 87-12 § 15, or alternatively under Rule 65B(b)(2) of the Utah Rules of Civil Procedure.

Park City Ordinance 83-16 § 6.01(m) provides that "Any licensee aggrieved by an Order of the City Council...may maintain an action for relief..." [emphasis added]. Park City Ordinance 87-12 § 15 contains language identical to Ordinance 83-16 regarding appeal. Rule 65B of the Utah Rules of Civil Procedure governs

extraordinary writs, and provides that "where no other plain, speedy and adequate remedy exists, relief may be obtained...under these rules...". Subparagraph (b)(2) provides: "Appropriate relief may be granted: (2) where an inferior tribunal, board or officer exercising judicial functions has exceeded its jurisdiction or abused its discretion;"

The Club/Alamo's "appeal" is in reality a prayer for a declaratory determination that the City's license revocation process is ultra vires and that its ordinances are preempted and/or unconstitutional, coupled with the request that this Court rewrite the Council's Conclusions of Law. However, the Club/Alamo has styled this action as an appeal in order to invoke the Small Business Equal Access to Justice Act which provides that a small business is entitled to an award of costs and attorney's fees if it "prevails" in an "appeal" of a business regulatory action undertaken by the City "without substantial justification" (Utah Code Ann. § 78-27a-1, et seq.). The actual relief requested by the Club/Alamo, however, is declaratory although the Club/Alamo has not plead the Declaratory Judgments Act. Park City's Motion to Dismiss is entirely in response to the "appeal" of the Club/Alamo and does not constitute a substantive response to the statutory and constitutional issues raised.

SUMMARY OF ARGUMENT

The Club/Alamo clearly is not aggrieved by the Order of the City Council dismissing the Order to Show Cause. The Club/Alamo wants to "appeal" the Council's Conclusions of Law and

"appeal" the City's license revocation procedure when neither of those matters is appealable.

Park City's own ordinances and the rules of appellate standing, mootness and justiciability disallow appeals by prevailing parties. There is simply nothing for the Club/Alamo to appeal from. The Club/Alamo lacks standing to appeal because they are not aggrieved by the Order of the City Council. Further, this appeal is moot and presents no justiciable issues for resolution by the court. This appeal should be dismissed with leave for the Club/Alamo to raise whatever issues it deems important in a proper action.

POINT I

The Club/Alamo lacks standing to appeal the Order of the Park City Council for the reason that they are not aggrieved

In *Society of Professional Journalists, Utah Chapter, et al, v. Honorable J. Robert Bullock*, 743 P.2d 1166 (1987), the Utah Supreme Court set forth the rules of appellate standing. In that case, the court considered a petition for an extraordinary writ pursuant to Rule 65B U.R.C.P., seeking to overturn an order of the District Court filed by an entity not a party to that proceeding. While the facts in the instant case are different, the court's ruling with regard to appellate standing does apply here. The court held: "Our generally stated standing rule is that a Plaintiff must have suffered 'some distinct and palpable injury that gives him [or her] a personal stake in the outcome of the legal dispute'" (at 1170).

In referring to appellate standing, the court reasoned:

> On appeal, a party whose standing is challenged must show that he or she had standing under the traditional test in the original proceeding before the District Court. [cases cited] In addition, an appellant generally must show both that he or she was a party or privy to the action below and that he or she is aggrieved by that court's judgment [cases cited]. Satisfaction of analogous requirements therefore will be necessary to demonstrate appellate standing and keep appellate review by writ on a par with appellate review by appeal. (at 1171, emphasis added)

Based upon its analysis, the court held as follows:

> Based on the foregoing, we conclude that to demonstrate appellate standing, one using a petition for a writ as a vehicle to obtain appellate type review of a trial court's ruling, must show the following: (i) the petitioner had standing to proceed before the District Court, (ii) the petitioner is challenging the District Court's ruling adverse to him or her, (iii) the petitioner appeared and presented his or her claim to that court. If the petitioner fails to establish any one of these standing requirements, this court will not consider the claims. (at 1172, emphasis added)

The Club/Alamo has failed to show that it has appellate standing because the challenged ruling is not adverse to them. It is clear that the Club/Alamo has suffered no "distinct and palpable injury" by reason of the Council's dismissal. The Club/Alamo may not be pleased by the license revocation proceeding, but they simply are not aggrieved by the Council's order. The Club/Alamo's actual argument is that the City Council had no constitutional or statutorily authorized license revocation procedure in the first place, and that commencement of the license revocation proceedings was ultra vire, unconstitutional and preempted by state law. Those would be an interesting inquiries in a declaratory action but it has absolutely nothing at all to do with the appealability of the

Council's order. As noted by the Utah Supreme Court in *Terracor vs. Utah Board of State Lands*, 716 P.2d 796 (1986), the issue of appellate standing is jurisdictional, and may be raised sua sponte by the court even if not plead by the parties. The Order entered by the City Council was the order prayed for by the Club/Alamo and deprived them, as a matter of law, of standing to appeal it. Because the Club/Alamo lacks appellate standing, this court lacks jurisdiction to consider this appeal, and it should be dismissed.

POINT II

This court should decline jurisdiction because the appeal is moot and presents no justiciable controversy

Quite simply, the appeal of the Club/Alamo is moot. The establishments have continued to operate, uninterrupted, from the time of the filing of the Order to Show Cause through the present date. The Order to Show Cause was dismissed by the City Council and the "The Club" and "The Alamo" are presently operating under valid and subsisting beer and liquor and business licenses issued by Park City.

There exists a clear judicial policy against giving advisory opinions even in declaratory actions. See, for example, *Merhish vs. H. A. Folsom & Associates*, 646 P.2d 731 (Utah, 1982) and *Backman vs. Salt Lake County*, 375 P.2d 756 (Utah, 1962).

The Utah Supreme Court in *Duran v. Morris*, 635 P.2d 43 (1981), held "If the requested judicial relief cannot affect the rights of the litigants, the case is moot and a court will normally refrain from adjudicating it on the merits." (at 45) There is nothing the

court can do with the Council's order which will affect the rights of the litigants except reverse it. Neither party is requesting reversal.

While the parties continue to have a relationship governed by the ordinances of Park City, the factual circumstance giving rise to the City's Order to Show Cause and the Club/Alamo's potential liability have been rendered moot by the Council's dismissal. The relief that the Club/Alamo seeks has nothing to do with the order of dismissal, but is an attack on the entire license revocation process. Such an attack should not be countenanced in the guise of an appeal, but should be dismissed.

CONCLUSION

The Club/Alamo has no springboard to launch an appeal of the City Council's order because they prevailed. Any citizen with standing may challenge the City's regulatory process at any time through a declaratory action, but the license revocation proceedings are over. The relief requested by the Club/Alamo would properly constitute a new cause of action, but not an appeal. Park City requests that the court find that it lacks jurisdiction of the appeal of the Club/Alamo and that it be dismissed with prejudice.

DATED this 1st day of June, 1989.

James W. Carter, Attorney for
Park City Municipal Corporation